BAR BULLETIN

PUBLISHED BY THE LOS ANGELES BAR ASSOCIATION

LEADING ARTICLES

Vol. 14 JULY, 1939 No. 11

BAR BULLETIN

Official Monthly Publication of Los Angeles Bar Association. Entered as second-class matter May 5, 1938, at the Postoffice at Los Angeles, California, under Act of March 3, 1879.
Subscription Price $1.00 a Year; 10c a Copy

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EDITORIAL

THE A. B. A. CONVENTION

A SIGNIFICANT feature of the convention of the American Bar Association at San Francisco, and to the casual observer, perhaps the most striking one, was the number and prominence of Federal lawyers and law officers in attendance, and the active parts they played in the sessions. This was not true of A. B. A. conventions of a few years ago.

Perhaps the reasons may be found in the facts that, within the past half dozen years, there has been a tremendous increase in the number of lawyers in the Federal service; to the vast amount of litigation to which the Government is either a party or is interested by reason of its regulatory activities, and to the opportunity afforded for discussing the Government's position on the many controversial matters in which it is necessarily involved.

Aside from these probable reasons, there is the more obvious fact of the growth and influence of the American Bar Association, not only within the legal profession, but in matters of public interest and public welfare, entirely aside from its activities in behalf of lawyers. The creation of the house of delegates, giving the association a more democratic form of government, has aroused more interest among the rank and file of lawyers in its annual conventions as a forum for the discussion of purely professional matters as well as subjects of wide public interest.

One is impressed by the amount of newspaper space devoted to the recent convention and by the extent of editorial comment concerning action taken upon matters of wide public interest. All of which furnishes proof of the growing importance of the A. B. A. to the legal profession, and the public regard for its considered action on matters affecting all of the people of our country.

THE AMERICAN BAR ASSOCIATION AND COURT ROOM PICTURES

THE Recent dispatches concerning action of the American Bar Association upon the report of its Committee on Cooperation between Press, Radio and Bar have been so misleading, and the editorial appearing under the caption "Courtroom Photographs" in the *Los Angeles Times* of Tuesday, July 18th, shows such disregard for actualities that I feel impelled to inform the lawyers of this county of the real situation.

The dispatch which appeared in the Times of July 15th, entitled "Bar Rejects Photo Ban. Association Fails to See That Cameramen Peril Court Dignity," says: "A committee of the American Bar Association today declined to approve the so-called 'Canon 35' which holds that taking photographs in court detracts from the dignity of the court". Substantially this same language appeared in a United Press dispatch in the Los Angeles Herald-Express of July 14th, under the heading "Modern Devices O.K'd by U. S. Bar Group". Tuesday's editorial in the Times purports to direct our attention to "a significant action taken at the A. B. A. convention at San Francisco last week," which is defined as follows: "This was the complete rejection of a proposed canon holding that the taking of photographs in court detracts from the dignity and decorum of judicial tribunals". There was no new canon proposed, and the Committee neither rejected nor declined to approve the said Canon 35; nor did the House of Delegates or the Assembly reject, modify or disturb the same. On the contrary, the Committee report, after observing that "Ultimately, it may become necessary for this Association to modify Canon 35", immediately concluded as follows:

> "*Meantime, your committee does not so recommend,* but again urges that its own existence be continued, upon the understanding that the subject matter of Canon 35 is, as we said last year, not 'removed from the field of further discussion'." (Emphasis added.)

The Times editorial is thus highly inaccurate when it refers to "this summarily discarded proposal".

The Committee's report does not say, as indicated by the newspapers, that its members found themselves unable to agree upon a satisfactory formula with respect to courtroom pictures. The fact is that the Committee found it impossible to arrive at any agreement with the committees of the newspaper publishers and editors. In this connection the report says:

> "Your committee has not so far been able to agree upon any formula regulating their use, which would be satisfactory to us, *and acceptable to the other committees,* though we believe that it is possible to obtain an agreement with them upon limitations which would *minimize the abuses* that have up to now characterized not only the use of cameras and microphones, but even the news columns of the Press, and the oral narratives of the Radio." (Emphasis added.)

A brief reference to the functions of the Cooperation Committee will assist in assigning to the recent report its true status. As that report says, "* * * the duty of this committee was primarily one of negotiating an agreement with the representatives of the organized Press and the organized Radio, which would prevent practices by lawyers, by newspapers, and by broadcasting stations, that would tend to interfere with the fair trial of cases." The Committee's first report

was presented to the 1937 convention. At that meeting the Committee on Professional Ethics and Grievances also presented its report, which included the proposed adoption of Canon 35 relating to improper publicity of court proceedings. The proposed amendments, according to the Committee Chairman, had "been formulated and recommended to you after one year of work by the Committee, which has been devoted, I may say perhaps in major part, to a study of the Canons of Ethics, particularly with respect to necessary or desirable amendments." Canon 35 was adopted without any dissent. It will be noted that it originated with the Ethics Committee and not the Cooperation Committee. At the 1938 meeting, the report of the Cooperation Committee was adopted only after amendment to its second recommendation, which amendment provided that the Committee "shall not express an opinion upon any question of professional or judicial ethics that may arise in connection with any of the foregoing matters." This limitation upon the Committee's powers was imposed with the consent of the Committee Chairman, who said in part:

> "We don't want to conflict with the work of the Ethics Committee, * * *, and it is not our purpose or our desire to take over any of the duties of the Ethics Committee any more than it is yours to take ours, nor is it our purpose to run counter to the Ethics Committee in its plans."

The 1939 Committee report emphasizes "inconsistency of continuing this committee under the instructions given if the provisions of Canon 35 are to remain unchanged." This is obviously based upon the expressed position of the publishers that "so long as the sentiment of the American Bar Association remains as set forth in the new Canon 35, your committee is not of a disposition to propose any further cooperative moves." The Bar Association Committee's report shows that the best it expects is an agreement which will "minimize the abuses" rather than correct them. In the face of all these things, the Committee, referring to the possibility of an ultimate modification of Canon 35, concluded its report with the remark: "Meantime, your committee does not so recommend * * *."

This report was not included in the Advance Program or in the Handbook of Reports on non-controversial matters which was distributed at the meeting; it was printed in a separate pamphlet. Upon learning of its contents, I had a conference with Mr. Giles J. Patterson, the Committee Chairman, explained to him the Los Angeles situation, the conditions which initially needed attention, the vigorous fight which was necessary to correct them, and the measurable success which has attended our efforts. He frankly stated that he was not familiar with our situation, did not have it in mind at the time of preparation of the report, and said he would, when presenting the matter to the House of Delegates on the following day, make a statement to the effect that the report was prepared without knowledge of the Los Angeles situation and was not intended to reflect one way or another upon it; and this he did. The transcript of the meeting is not yet available. But in response to inquiry from me, Mr. Patterson has telegraphed that:

> "In presenting report I made full statement of situation in accord with our conversation of Thursday and specifically stated that the report was not intended to express any opinion upon situation at Los Angeles which had not been brought to attention of committee at time report was prepared."

The remarks attributed to Mr. Patterson in the news accounts are quotations from the Committee report and not, I believe, from his oral presentation of the matter, which carefully refrained from reflecting upon the Los Angeles conditions. The best information now obtainable is to the effect that the report was not formally approved, but was merely presented, explained and filed; I was not able to be present at this meeting and my informants are not positive upon this point.

The Times editorial of Tuesday says:

> "In letter and spirit, this summarily discarded proposal is essentially identical with an order which a local Bar Association group sought to obtain from the California Judicial Council a year ago. It received similarly short shrift from that body, which held that the courts * * * are amply able and willing to protect their own dignity without outside assistance."

The fact is that the statement issued by the Judicial Council recited that it had "been made to appear to the Judicial Council of the State of California that the practice of taking photographs in court rooms during trials is being abused to the detriment of litigants and to the discredit of the courts generally" and, having found the proposed rule unnecessary "because the subject is covered by the resolution of the California State Bar in harmony with section 35 of the Canons of Judicial Ethics of the American Bar Association", concluded as follows:

> "The Council is further of the view that observance of the principles therein contained is essential to the proper and orderly administration of justice, and to the guaranty of a fair and impartial trial for all parties concerned."

Canon 35 of the American Bar Association still stands in full vigor, as does the statement of the California Judicial Council. The State Bar resolution "in harmony with Canon 35" was adopted in September, 1937, by the Convention and later by the Board of Governors, and it has never been modified. I have been reliably informed that recently an effort was made to have the Board of Governors reconsider the same and that the Board declined so to do.

Los Angeles, July 20, 1939.

A. W. ASHBURN,
President, Los Angeles Bar Association.

LEGAL ARTICLE CONTEST EXTENDED

THE BULLETIN Committee announces that the closing date of the LEGAL ARTICLE CONTEST has been extended to December 31, 1939. The contest is open to all members of the State Bar 35 years of age or under. The prizes for the best articles on subjects of current interest to the profession are:

First Prize	$100.00
Second Prize	75.00
Third Prize	50.00

Complete rules were published in the September, 1938, BAR BULLETIN. Full information concerning the contest may be obtained at the office of the LOS ANGELES BAR ASSOCIATION.

IF YOU ARE ELIGIBLE, WHY NOT COMPETE?

In Memory of
EMMET H. SEAWELL

The passing of the Honorable Emmet H. Seawell, Associate Justice of the Supreme Court of California, brought to a close a distinguished and honorable judicial career.

As Judge of the Superior Court for Sonoma County for twenty years, followed by seventeen years on the Supreme Court, Justice Seawell impressed his abilities and character upon the judicial history and records of the State, and by his kindly and tolerant personal qualities inscribed his memory in the hearts of the many members of the legal profession who knew and respected him.

Justice Seawell's long life was contemporaneous with the years of progress and development of his native California, and his service upon the bench covered the most important period of its juridical history.

Born at Yountville, in Sonoma County, in 1862, of pioneer parentage, he obtained his early training at Pacific Methodist College, in Santa Rosa. In the 1887 Assembly he was Clerk of the Committee on Judiciary, and in 1890 was admitted to the Bar. Two years later, in 1892, he was first elected District Attorney of Sonoma County, and reelected in 1894. Elected to the Superior Court of Sonoma County in 1894, Judge Seawell served on that bench continuously until 1922, when he was elected Associate Justice of the Supreme Court.

During the World War, Judge Seawell served as Chairman of the Council of Defense for Sonoma County, and also as Chairman of the Legal Advisory Board in his home county. From College of the Pacific, at Stockton, in 1931, Justice Seawell received the honorary degree of LL.D. He was married to Ida S. Graeter in 1892, who, with a son and daughter, survive him.

To the lawyers of California who have long been accustomed to see the well known and kindly face of Justice Seawell at every session of the high court, his passing comes as a distinct loss, and among his distinguished associates his wise counsel will be greatly missed. During his long experience on the bench, Justice Seawell wrote the decisions in many notable cases, particularly in criminal cases that reached the Supreme Court.

The Bar of the entire State will deplore the loss of an honorable, fair and conscientious judge, and the Los Angeles Bar Association, by its Board of Trustees, extends to members of the deceased jurist's family its sincere condolence.

PRACTISING LAW COURSES

THE series of courses for practising lawyers, summer session, under the direction of the Los Angeles Bar Association, will begin July 24, at the Assembly Hall, room 115, State Building, Civic Center, Los Angeles. Each lecture will be from 9 to 11 a. m., 11 a. m. to 1 p. m., and one evening lecture from 7 to 9 p. m. Each course will consist of three lectures on successive days. The cost of the entire series of five courses is $32.00. A single course will cost $8.00.

Following is a list of the subjects, with names of lecturers, times and place:

1. INCOME TAXES—*Joseph D. Brady*
   Monday.....July 24, 9 to 11 a. m.
   Tuesday .....July 25, 9 to 11 a. m.
   Wednesday....July 26, 9 to 11 a. m.

2. CORPORATE PROCEDURE—*Paul Fussell*
   Monday.....July 24, 11 a. m. to 1 p. m.
   Tuesday .....July 25, 11 a. m. to 1 p. m.
   Wednesday....July 26, 11 a. m. to 1 p. m.

3. TRUSTS AND POWER—*Walter Nossaman*
   Thursday.....July 27, 9 to 11 a. m.
   Friday .....July 28, 9 to 11 a. m.
   Saturday .....July 29, 9 to 11 a. m.

4. DEATH AND SUCCESSION TAXES—*David Tannenbaum*
   Thursday.....July 27, 11 a. m. to 1 p. m.
   Friday .....July 28, 11 a. m. to 1 p. m.
   Saturday .....July 29, 11 a. m. to 1 p. m.

5. TRADE REGULATION—*Shelden D. Elliott*
   Monday.....July 24, 7 to 9 p. m.
   Tuesday .....July 25, 7 to 9 p. m.
   Wednesday....July 26, 7 to 9 p. m.

The committee in charge welcomes the out-of-county lawyers to these sessions, conducted by recognized experts in their respective fields of the law.

COMMITTEE ON LAW LECTURES
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"HOW LONG IS 25 YEARS?"

GRAPHICALLY illustrating the importance of the past 25 years in Los Angeles' history, the Union Bank & Trust Co. has published an attractive pamphlet titled, "How Long is 25 Years." The bank this month is celebrating its Twenty-fifth Anniversary. The booklet was compiled to show that the significance of any period of growth can only be judged by the importance of the events occurring during that time.

It presents a brief chronological record of important highlights in the city's history. The booklet shows the rapid strides Los Angeles and the Union Bank have made during that period—strides which place Los Angeles as fifth largest city in the United States and the bank as one of the west's leading banking institutions.

A few of the important events contained in the booklet include: completion of the first municipal wharf at the harbor; first distribution of natural gas in Los Angeles; Montebello, Signal Hill and other oil fields discovered; founding of major aircraft industries; debut of radio stations; harbor selected as Pacific Fleet base; first Los Angeles to New York air lines; new city hall, general hospital, federal building, coliseum and many more equally important developments. Copies of the booklet are available.

While Los Angeles was growing rapidly during those important 25 years, the Union Bank & Trust Co. grew from 63 customers and deposits of $300,000 in 1914, to 27,000 accounts and resources of $43,000,000 in 1939.

SOME FUNDAMENTAL PROBLEMS OF ADMINISTRATIVE PROCEDURE*

By Ray A. Brown, Prof. of Law, University of Wisconsin

THE majority of thoughtful and informed lawyers would I believe, agree with me, in saying that the most significant recent development in the legal system of this country is in "Government through Administrative Boards and Commissions." That there are many governmental boards, both federal and state, who exercise positive governmental controls over the conduct of people cannot be denied. In a survey made for the United States Senate in April of last year over 100 federal administrative agencies alone were listed which exercised direct governmental control over private citizens. In the various states we have such important administrative bodies as the Industrial Commission, the Public Service Commission, the Tax Commission, and the Insurance Commissioner, and I have not exhausted the list. These boards may make orders having the practical effect of legislative enactments, as when a Department of Agriculture fixes the price at which milk shall be sold, or the Wages and Hours Division of the Federal Department of Labor determines the minimum wages for workers in industry affecting interstate commerce. At other times they perform functions akin to those of courts, as when under the Workmen's Compensation Act an Industrial Commission determines in a dispute between employer and employee, whether the former must compensate the latter for an injury alleged to have been due to his employment; or when the National Labor Relations Board rules that an employer must return to employment and pay lost wages to an employee, because the said employee was discharged for union activities contrary to the provisions of the statute.

It is natural, particularly among lawyers accustomed to the traditional procedures of legislative assemblies and courts of law, that this administrative exercise of legislative and judicial power should create some discontent and even a fear that the personal liberties and property rights of the people were being dangerously committed to the dictatorial powers of an irresponsible bureaucracy. This is indicated by the titles of three prominent books published in the last decade: Bureaucracy Triumphant, by Professor C. K. Allen of Oxford University, England; Our Wonderland of Bureaucracy and its Destructive Effect on the Constitution, by James M. Beck, former solicitor general of the United States, and The New Despotism, by the Chief Justice of England, Lord Hewart of Bury. A report last summer by a committee of the American Bar Association of which former Dean Pound of Harvard was chairman, has much to say of administrative absolutism, and lists ten tendencies endangering justice to which administrative agencies are subject.[1] An extreme point of view was expressed at a recent meeting of that association by a member of its governing body and an ex-governor of the state of Georgia, who apparently opposed even recognition by that body that a system of administrative government existed. He said: "I am opposed to practically all bureaus, and all administrative agencies as distinguished from courts, where the ideal is to administer justice, and not to conform to some particular political, social or economic theory. . . . Administrative boards are appointed because of their predilections along certain lines, and we find them rendering

*Address before the Los Angeles Bar Association, Law School of University of Southern California, June 22, 1939. Prof. Brown is Visiting Professor at University of Southern California Law School, summer session, 1939

[1]63 Rep. Am. Bar Assn. 346 (1938).

decisions without a hearing, and contrary to the overwhelming weight of the evidence. . . . They afford a field of work to the politician, the manipulator, and the political magnate who is influential in party councils. The only legitimate atmosphere of the lawyer is in that forum where justice is administered. . . . I do not believe that there should further be developed in America a system of Administrative Law. On the contrary, I believe that the 130 administrative agencies could be diminished with great benefit to the public."[2]

MOVEMENT ADVANCES

However, in spite of the widespread and vigorous resistance to government by administrative agencies the movement is not checked, rather it advances with inexorability of the mounting tide. Foes as well as friends of administrative law unanimously admit this fact. The resort to government by administrative agency is indeed part and parcel of the revolutionary changes in our economic and political life that have occurred in the past century. Up until the late seventies of the last century the United States was essentially a rural and agricultural community, largely dominated by a pioneer spirit stressing individual incentive and responsibility. Large scale mass production in industry had scarcely begun. The great public service enterprises—railroad, gas and electric, telephone and telegraph companies—were unknown or in their infancy. Most farms were completely independent and self-sustaining units, supplying from their own forests, fields and pastures, shelter, food and clothing for the families who lived thereon. There was slight occasion for governmental regulation of the affairs of men. Of course overt acts—assaults, thefts, etc.—by one person against another had to be controlled. A certain minimum of public service—highways, schools, police protection—had to be provided, and taxes to support them levied, but that was about all. For this comparatively slight task of government, the traditional branches of government, the elected legislature, the usual executive officers, and the regularly constituted courts of justice were quite adequate. A popular slogan was: "That government is best which governs least."

But life has changed. Instead of a simple economic society, we now have a most complex one; instead of individual independence we now have almost complete dependence upon others for all that makes life possible. The milk supply of a large city is produced on farms hundreds of miles away, brought to the city by railroad and truck, and processed and distributed by yet a third agency. Railroads, bus and truck lines are the arteries of the nation's economic body. If they fail to function atrophy follows. With the replacement of practical economic independence, came a change in legal and political thought and action. Government no longer leaves the welfare of society to the free and uncontrolled desires and actions of individuals, but undertakes itself by positive action to control the economic relations between men in the interests of a supposed common good. Beginning with the Granger movement of the seventies, government entered into the task of regulating the services and charges of the public utilities, the railroads, gas and electric companies. Since then the regulatory power of the state has advanced into new and yet newer fields. A state regulated society has to a large extent superseded an individualistic one.

BURDEN OF REGULATION

It is at this point that government by administrative boards and commissions enters the picture. The new burden of regulation that the state has assumed is a tremendous one. A popularly elected legislative body drawn from all walks of life, and meeting only periodically, is hardly competent to accomplish the

[2]See 25 A. B. A. J. 94 (1939).

difficult and technical task of fixing the rates for gas and electricity that will both be reasonable to the consumer, and at the same time furnish a fair profit to the utility. While there may be popular consensus of opinion that maximum hours and minimum wages should be set for workers in industry, it is extremely difficult for a legislative body of laymen with no opportunity for extensive research to determine just what those hours and wages should be. In many fields of control about all the legislature can do is to indicate the general objectives, and leave to some one else the task of filling in the details. Our regularly constituted courts are also inadequate to enforce the social controls for which the new dispensation calls. They are already heavily burdened, and their procedure is often technical, slow, and expensive. As the state in response to popular pressure enters into each new task of social control, the popular reliance is on some body of hoped for experts to work out the details of the regulation demanded, and to attend to its proper enforcement. Within the boundaries of the social problem presented administrative agencies make regulations, enforce compliance, and adjudge cases, and scant attention is paid to the question whether many of these functions are of a type normally performed by legislatures and courts. The result is that today in many fields of governmental activity laws are made, not by the elected representatives of the people, but by appointed commission heads and their staffs, and that cases are decided, not by courts and juries, but by administrative officials.

It must not be supposed that the process through which the power of legislation and adjudication is conferred on administrative bodies has been without legal objection or hindrance. I cannot now take the time to explain in detail how. administrative commission survived the attack that *they*, though not legislatures,

exercised legislative powers, and that they though not courts, exercised judicial powers, contrary to the constitutional mandate. The courts of the land finally, influenced without doubt by the conviction that the practical exigencies of government required such exercise of power by administrative bodies, came to the conclusion that these bodies in making regulations were really not legislating all; that the essential act of legislation—the determination of the public policy—was determined by the constitutional and regularly elected legislature, and the administrative agency, in its subordinate regulations, was merely filling in the details; that administrative agencies in deciding cases were not adjudicating, as long as they did not enforce their own decisions and a modicum of review in the regular courts was available.[3]

BAR SHOULD HELP

Whether one agrees or disagrees with this action of the highest courts, it is certain that the question whether we shall have administrative tribunals with vast and important powers is no longer an open one. Such agencies we need, such agencies we have, and such agencies and more of them, we shall continue to need and have. To the bar, many of whom look with trepidation at this development, I would respectfully suggest that they cease their blind and usually ineffectual opposition to the movement, and turn their attention in a friendly and helpful manner to the commissions themselves, their personnel, their organization, and their procedures, in order to ascertain the quality of the justice they administer.

[3]For a realistic approach to the problem of delegation of legislative power, see *State ex rel. Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N. W. 929 (1928).

The great problem in administrative law today is, I am convinced, the development of administrative principles and processes, which will secure that efficiency and sanction which is demanded for the great tasks which are committed to them, and will at the same time secure to the private parties affected by their determinations that fair and impartial treatment which is the *sine qua non* of our democratic Anglo-American traditions of law and government.

There are indeed those, who see in a greater judicial control over administrative determinations, the ultimate answer to the charges of administrative absolutism and unfairness. With all due respect, I cannot believe that this is the true solution of the problem. From the very commencement of administrative law judicial control has been limited partly by legislative enactment, and partly by judicial self restraint. It was recognized that the newly created administrative agencies were intended to be important bodies possessing substantial powers and authoritative sanctions. They were to be much more than mere commissions to take testimony. Accordingly it is generally held that when a commission has given the parties before it a fair hearing, when its findings of fact find substantial support in the evidence, and when it correctly applies the law of the land to the facts thus found, the commission's decision will be upheld and enforced by the regular courts of justice.[4] Two decisions of the United States Supreme Court do indeed constitute partial exceptions to this general principle of judicial tolerance. In *Ohio Valley Water Co. v. Ben Avon Borough*[5] the court held that where a rate order of a public service commission, claimed to be unconstitutional because confiscatory, affected the entire revenues of the utility, the due process clause of the Fourteenth Amendment required that the reviewing court on its own independent judgment find the value of the utility's property, on the determination of which the claim of confiscation rested. Again, in *Crowell v. Benson*[6] the court went further, and in a case under the federal Longshoremen's Act held that the judicial power conferred on the courts by the constitution required the reviewing court, not only to exercise an independent judgment, but also itself to take evidence on the question whether the claimant was in fact an employee of the respondent, for on this point according to the court the constitutional right of the commission to act at all depended.[7] Some decisions involving court review of the determinations of the Federal Trade Commission are also somewhat out of line with the general trend.[8] But in all of these cases a vigorous dissent was entered by the then so-called liberal minority. That minority has now become a majority, and for these aforementioned cases I venture to predict a speedy demise, when the point is again raised in the Supreme Court of the United States. While there are movements at different times and places to pass legislation enlarging the scope of judicial review, I do not believe that success will await such attempts. To permit a party disappointed by an administrative determination, to try the matter all over again in the regular courts would reduce the commissions to impotence, place an inappropriate and impossible burden on the courts, and be tremendously wasteful of the public's time and money. While judicial review is by no means to be neglected, the focus of the administrative law problem today is in the organization and procedures of the administrative agencies themselves.

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[4]See *Interstate Commerce Comm. v. Union Pac. R. Co.*, 222 U. S. 541 (1912).

[5]253 U. S. 287 (1920).

[6]285 U. S. 22 (1932).

[7]These two cases were followed in *Drummey v. State Board*, (Cal. 1939), 87 Pac. (2d) 848.

[8]See McFarland, Judicial Central of the Federal Trade Commission and the Interstate Commerce Commission (1933).

UNION OF POWERS

One of the most common and serious complaints concerning government by administrative agencies, concerns the union within each agency of the legislative, executive, and judicial functions. As you well know, such a union of powers was regarded by our forefathers as the very essence of tyranny, and many of our constitutions included express provisions to guard against it.[9] On the other hand, a considerable degree of such a union is the very hope and sinew of most administrative bodies. They are appointed and empowered with the duty of becoming masters in and of certain specific economic and social fields, and it is not intended that such a purpose shall be thwarted by requiring them to confine their activities within a single field of legislative, executive, or judicial action. Our traditional separation of governmental powers was on a horizontal pattern; the legislative, executive, and judicial departments of government cutting across all phases of the state's activity. In the new dispensation, however, the division is a vertical one. Different phases of the state's activity—the regulation of utilities, the control of relations between employers and employees, the levy and collection of taxes—are committed to a single agency, which in connection with the problem committed to it exercises all the traditional powers formerly exercised separately by legislatures, executive officials and courts.

According to Dean Landis of the Harvard Law School the role of such commissions as the Interstate Commerce Commission and of the Securities and Exchange Commission, of which he was formerly chairman, in controlling the economic enterprises entrusted to them is akin to that of a board of directors managing a corporation, and with as little occasion as in that case for applying the doctrine of the separation of power.[10] There is indeed a tendency in some quarters to regard that doctrine as outmoded and unsuitable to our twentieth century streamlined type of government. With this point of view not all students of the problem are in accord, particularly when the question relates to the combining of the prosecuting and adjudicating functions. Gerard Henderson, in 1924, called attention to the incongruity of the Federal Trade Commission organization wherein the commission, first investigated, then filed a complaint before itself, and then sat as a judge to determine if the complaint were justified.[11] The Committee upon Minister's Powers in England in 1932, although approving administrative law in general, sensed a danger in committing judicial and quasi-judicial powers to an individual who was at the same time charged with the function "of making the department go."[12] In the furor over the President's plan of Administrative Reorganization, not much notice has been taken of the fact that part of that plan was to provide for a more complete separation in our administrative organization of judicial and executive powers.[13] It is indeed a sound psychological truth that any individual who has at one and the same time the duty of prosecuting and also of adjudicating will find, either that his zeal as an advocate is blunted or his judgment as a judge warped.

But this is not a matter to be disposed of on theory alone. I am convinced that in certain instances which have come under my personal observation, it is quite possible to vest in the same body, and even in the same individual, both the executive and the adjudicative function and attain justice. Where a large volume of business is handled; where the contentions made are of a routine and even of

[9]See Const. of Cal., Art. III, Sec. 1.
[10]Landis, The Administrative Process, p. 10 (1938)
[11]Henderson, The Federal Trade Commission, pp. 83, 327 (1924).
[12]Report of Committee on Minister's Powers, p. 76 (1932).
[13]Cushman, The Problem of the Independent Regulatory Commissions, pp. 24, 29 (1937).

a technical character capable of pretty exact proof or disproof; where neither the public at large nor influential pressure groups pay much attention to the individual decisions, then I think but little harm results in committing to such an agency as an Industrial Commission the duty of enforcing an accident or an unemployment compensation law, and also of determining as judge disputes that arise under these laws. When, however, the cases handled by the administrative agency are not of a routine character, when the decisions of fact to be made are not susceptible of precise determination, and when large portions of the public express a vehement interest in the disposition of the case one way or another, then there is, I believe, a real danger to justice in having the one who prosecutes the case also act as judge in deciding it. The administration of our laws for deporting aliens where the Department of Labor acts both as policeman and judge in exporting undesirables has at times been a national disgrace. The National Labor Relations Board has had great difficulty in persuading some that in enforcing the Labor Relations Act it always acts with due consideration to both sides of the controversy.

Indeed, the desirability of the separation of the executive and judicial duties in our administrative organization is now being recognized by government itself. In the administration of the federal revenue laws a Board of Tax Appeals, and a Customs Court both administrative judicial bodies but independent of the revenue collecting agencies, are provided for the determination on appeal of disputes between the government and the taxpayer. Most large administrative boards have trial examiners for the holding of hearings, and there is some effort made to relieve them from all but their judicial duties.[14] But in the smaller com-

[14]Madden, Administrative Procedure, National Labor Relations Board, 45 W. Va. L. Q. 93 (1939).

missions such as we have in the various states the volume of business, the personnel and the budget is often too limited to permit even this limited separation of functions. That the union in one board or commission of the duty of enforcing as well as that of adjudicating has a tendency to injure the quality of justice administered cannot, I believe, be denied. The danger of it can best be kept at a minimum if the fact of the danger be recognized; if the heads and technical staffs of our boards and commissions be not alone zealous advocates of particular economic theories, but also men with a strong respect for the law of the land, and a determination that, whether particular decisions be popular, politic, or expedient or not, the law shall be applied regardless of person, and without fear or favor. To secure a personnel of this type, political appointments and obligations arising therefrom must obviously be kept to the minimum, and a strong, secure and professionalized civil service be maintained.

ADMINISTRATIVE TRIBUNALS UNHAMPERED

I need not remind a group of lawyers that one of the surest protections of the individual citizen against arbitrary and vicious action of government, lies in a prescribed and detailed procedure for those processes, by which the policy of the state is declared, and the rights and duties of individuals under that law vindicated and enforced. Much of the procedure of our courts of law, which to the layman often seems so technical and cumbersome is designed for this very purpose. Administrative tribunals, however, in adopting a procedure for the conduct of their business, have been exceedingly unhampered. Indeed in establishing such tribunals one of the aims of the legislature has been to free them from the so-called technical rules of the common law. It was thought, and with a good deal of reason, that judicial procedure had become so involved and technical, that often the pursuit of the ultimate truth was forgotten in the absorption by the lawyers in the intricacies of the procedure itself. Accordingly in many instances we find such provisions as the following from the New York Workmen's Compensation Act: "The Commission in conducting a hearing shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, but may conduct such hearing in such manner as to ascertain the substantial rights of the parties."[15]

(Note: Prof. Brown's article will be completed in the August Bulletin.)

case of *Lumley v. Wagner*[1] and thereby embarked the courts of Chancery

[15]Acts of 1914, Ch. 41, Sec. 68.

THE MILLION DOLLAR EXCEPTION*

By Hudson B. Cook, of the Los Angeles Bar

THE fifth subdivision of Section 3423 of the Civil Code, and of Section 526 of the Code of Civil Procedure, both provide in identical terms that an injunction cannot be granted "To prevent the breach of a contract, *other than a contract in writing for the rendition or furnishing of personal services from one to another where the minimum compensation for such service is at the rate of not less than six thousand dollars per annum and where the promised service is of a special, unique, unusual, extraordinary or intellectual character, which gives it peculiar value the loss of which cannot be reasonably or adequately compensated in damages in an action at law,* the performance of which would not be specifically enforced . . ."

We have chosen to characterize the italicized words with the somewhat colorful appellation "The Million Dollar Exception," excusable, perhaps, when it is considered that it constitutes the statutory foundation upon which a vast fortune in so-called "star contracts," one of the largest assets of California's wealthy motion picture business, must find its succor and support. Yet, curiously, (or perhaps understandably) in this, the home state of the industry, in spite of the recurrent and oft-publicized differences between the studio and their star-artists, in spite of the several controversies that have reached the stage of a trial court judgment, no person has as yet undertaken to test the real meaning and extent of the exception in the crucible of an appellate decision.

Upon its face the statute seems by its necessary implication clear enough given a contract calling for the rendition of personal services of a unique and special character for which $6,000 or more a year is to be paid, and a threatened or actual refusal on the part of the actor (we use the word generically as inclusive of both sexes) to perform his agreement, the employer may seek the aid of equity in enjoining the threatened or further breach upon pain of committing for contempt, in brief, may obtain a decree compelling, in substance, the specific performance by the actor of his obligation to render services. Were that the true meaning and intent of the exception this paper would come to an abrupt finish. It is our purpose, however, to show that in all probability the true effect of the exception is to permit the courts to enforce the *negative covenant* of such personal service contracts as opposed to the affirmative obligation to render services, and then only under circumstances hitherto generally recognized.

In 1852 Lord St. Leonards rendered his classic decision in the famous case of *Lumley v. Wagner*[1] and thereby embarked the courts of Chancery upon a new and one of the most interesting developments of equity jurisprudence. The case is no doubt familiar to all. Benjamin Lumley, the lessee of Her Majesty's Theatre in London, had engaged Mlle. Johanna Wagner, a German opera singer, to sing in six operas to be presented by him over a three-month period, for which he undertook to pay her £400 per month. As an afterthought and by way of amendment to the agreement, a covenant was added whereunder during the course of the contract Mlle. Wagner undertook not to use her talents at any other theatre or concert without written authorization of Mr. Lumley. The dénouement is legal history; seduced by the lure of greater returns, the defendant entered into an agreement with Frederick Gye

*This article is submitted in THE BULLETIN prize contest open to Junior Barristers.

[1] 1 De G. M. & G. 604.

to sing at his Covent Garden Theatre and plaintiff thereupon brought his bill in equity seeking to restrain her from singing at the Covent Garden Theatre or any other theatre during the term of her contract, without plaintiff's written consent. In granting the relief prayed, Lord St. Leonards had this to say in the course of a many page decision:

> "It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing at any other theatre while this court had no power to compel her to perform at Her Majesty's Theatre. It is true, that I have not the means of compelling her to sing, but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. . . . The injunction may also, as I have said tend to the fulfilment of her engagement though in continuing the injunction, I disclaim doing indirectly what I cannot do directly."

These last two sentences are both the heart of the decision and an expression of its limitations. Equity would not, in fact could not, compel the artist to perform, but it would, where the remedy at law was inadequate, enjoin a breach of the negative covenant, the agreement not to render her services to another.

It is not perhaps so generally known that despite the injunction, restraining her from singing for Gye, the defendant did not perform her contract to sing at Her Majesty's Theatre, and to Lumley was left the profitless glory of having his fame more surely perpetuated in the annals of law[2] than in the annals of the theatre.

But though Mlle. Wagner proved herself to be immune from the importunities of an indirect coercion, the equity principal to which her inequitable conduct gave birth has proven effective in countless subsequent cases; so much so that there has developed a slovenly tendency to speak of equity as "enjoining the breach of personal service contracts;" nothing could be more inexact; the courts have never, to our knowledge, ventured beyond the bounds that Lord St. Leonards so clearly recognized, not from any lack of meritorious grounds but because it is both impracticable and impossible to do more. True, some later cases, particularly in America, have departed from the view that the negative covenant in personal service contracts must be express and where defendant has contracted to devote his peculiar abilities exclusively for the benefit of the plaintiff for a certain period of time he has been enjoined from rendering those same services to another, the covenant not to work or perform for others being implied.[3]

The subject exception was written into C. C. Sec. 3423(5) and C. C. P. Sec. 526(5) by act of the Legislature on May 6, 1919 (1919 Stats. pp. 325 and 328). Exactly one year previously, in May, 1918, the District Court of Appeal, First Appellate District, had rendered its opinion in the case of *Anderson v. Neal Institutes Co.*, 37 Cal. App. 174, and had held that these sections as they then stood: "An injunction cannot be granted . . . to prevent the breach of a contract, the performance of which would not be specifically enforced," prevented this state from following the doctrine of *Lumley v. Wagner*. The court there had this to say, p. 177:

> "Where, as here, a contract contains both affirmative and negative stipulations, the authorities are in irreconcilable conflict upon the question whether

[2]See, also, the leading case of *Lumley v. Gye*, 2 E. & B. 216 (1853), 360.

[3]See *Montague v. Flocton*, L. R. 16 Eq. 189; *Harry Rogers Theatrical Enterprises v. Comstock*, 225 App. Div. 34; *Duff v. Russell*, 63 N. Y. Superior Ct. 80, aff'd 133 N. Y. 678.

> equity will interfere to prevent a breach of the negative covenant when the affirmative covenant is of such a nature that it cannot be specifically enforced by a judicial decree. (2 High on Injunctions, Sec. 1164.)
>
> . . . . . .
>
> "It thus appears, as before stated, that there is a conflict in the decisions as to whether, under the circumstances of a case like this, the plaintiff would be entitled to an injunction to restrain the violation of a negative covenant of his contract with the defendant; *but in this state the question was put at rest at the time of the adoption of the Civil Code by the terms of subdivision 5 of section 3423.*
>
> . . . . . .
>
> "Subdivision 5 of section 3423 is free from ambiguity or uncertainty, . . . *the court will not interfere by injunction to prevent the violation of an agreement of which, from the nature of the subject, there could be no decree of specific performance.*" (Italics ours.)[4]

It is not unreasonable to suppose that it was the ominous threat of this language which led to the speedy enactment of the exception, nor is it piling inference on inference to assume that the legislature in its solicitude for the infant motion picture industry intended to go no further than thenceforth to commit this state to the *Lumley v. Wagner* doctrine from which the Neal Institutes decision had so unequivocably divorced it.

Both reason and unanimity of precedent support us in this view. It is axiomatic that to enjoin the breach of an agreemeent to render services is to specifically enforce it; the negative phrasing is at most a legal euphemism. As Lord Justice Lindley said in *Whitwood Chemical Co. v. Hardman*, L. R. 1891,

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[4]For a recent reaffirmation of this holding, see *Long Beach Drug Co. v. United Drug Co.*, 97 C. D. 329, 335.

2 Ch. 416, where the agreement was a wholly affirmative agreement by the defendant to give "the whole of his time" to plaintiff company:

> "Now every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on *ad infinitum;* but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it. The Court has never gone that length, and I do not suppose that it ever will. . . ."[5]

Moreover, an affirmative undertaking is enforceable by a decree of specific performance (C. C. Sec. 3367, "Specific relief is given . . . by compelling a party to do that which ought to be done") and yet C. C. Sec. 3390 provides *with no exception,* "The following obligations cannot be specifically enforced: (1) An obligation to render personal service." If the exception were intended to permit an injunction against the breach of an affirmative obligation to render services, it is logical to suppose that it would be found in section 3390 (1) instead of section 3423 (5).

Our Supreme Court in *Poultry Producers, etc. v. Barlow,* 189 Cal. 278 at 288, gave recognition to three general reasons for equity having consistently refused to specifically enforce contracts of personal service; one of them is public policy, two are more fundamental: impracticability, if not impossibility of giving that form of relief, and the mandate of the Constitution itself. For equity to attempt to compel the actor to act or the singer to sing would not only be a new and unique venture for the Master in Chancery, it would lead to absurd results. In *Hamblin v. Dinneford,* 2 Edw. Ch. 529 (N. Y.), where the defendant was an actor, it was pertinently observed that to commit the defendant for contempt would be to defeat the very purposes of the injunction asked:

> "The difficulty is how to compel specific performance. The court cannot oblige Mr. Ingersoll to go to the Bowery theater and there perform particular characters. Imprisonment for a contempt would be the consequence of his refusal, and this would defeat the very performance sought to be enforced."

Again in *De Rivafinoli v. Corsetti,* 4 Paige 264 (N. Y.), Chancellor Walworth, in refusing a writ of *ne exeat* to restrain an opera singer from his threatened departure to Havana on the eve of his contract to perform in New York, facetiously suggests another insuperable obstacle to equity compelling specific performance: what officer of the court is sufficient of a critic to determine whether the artist performs according to the spirit and intent of his contract?

> "I am not aware that any officer of this court has that perfect knowledge of the Italian language, or possesses that exquisite sensibility in the auricular nerve which is necessary to understand, and to enjoy with a proper zest, the peculiar beauties of the Italian opera, so fascinating to the fashionable world. There might be some difficulty, therefore, even if the defendant was compelled to sing under the direction and in the presence of a master in chancery, in ascertaining whether he performed his engagement according to its spirit and intent. It would also be very difficult for the master to determine what effect coercion might produce upon the defendant's singing, especially in the livelier airs; although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama. But one thing at least is certain; his songs will be neither comic, or even semi-serious, while he remains confined in that dismal cage, the debtor's prison of New York."

[5] *Arizona Edison Co. v. Southern Sierras Power Co* (9th C. C. A.) 17 Fed. (2d) 739, 740: "To enjoin the breach of a contract is, in effect, to decree its specific performance, and the principles applicable to the two remedies are the same." See, also, *General Petroleum Co. v. Beanblossom* (9th C. C. A.) 47 Fed. (2d) 826, 828; *Engemoen v. Rea* (8th C. C. A.) 26 Fed. (2d) 576, 578.

DAVIS CASE

In the Bette Davis case (*Warner Bros. Pictures, Inc. v. Nelson* (1937) 1 K. B. 209, 115 L. T. R. (N. S.) 538), one of the most recent cases to be found upon this topic, the court again emphatically declared that equity has no power to enforce the affirmative obligation, nor will it even enforce the negative covenant if the only effect thereof is necessarily to enforce the affirmative, p. 539:

> "The mere fact that a covenant which the court would not enforce, if expressed in positive form, is expressed in the negative instead will not induce the court to enforce it. That appears, if authority is needed for such a proposition, from *Davis v. Foreman* (1894) 3 Ch. 654; *Kirchner v. Gruban* (99 L. T. Rep. 932; (1909) 1 Ch. 413), and *Chapman v. Westerby* (136 L. T. Jour. 406; (1913) N. W. 277). The court will attend to the substance and not to the form of the covenant. *Nor will the court, true to the principle that specific performance of a contract of personal service will never be ordered, grant an injunction in the case of such a contract to enforce negative covenants if the effect of so doing would be to drive the defendant either to starvation or to specific performance of the positive covenants:* See Whitwood Chemical Company v. Hardman (64 L. T. Rep. 716; (1891) 2 Ch. 416. . . ."

Apart, however, from the impracticability of attempted enforcement of the affirmative obligations of personal service contracts, particularly where the services are of an artistic or intellectual nature, is the further difficulty suggested by the Seventh Circuit Court of Appeals in *Arthur v. Oakes*, 63 Fed. 310, decided by Mr. Justice Harlan while sitting as a circuit judge. The court there said, page 317:

> "But the vital question remains whether a court of equity will, under any circumstances, by injunction, prevent one individual from quitting the personal service of another? An affirmative answer to this question is not, we think, justified by any authority to which our attention has been called or of which we are aware. It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude,—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction. Courts of equity have sometimes sought to sustain a contract for services requiring special knowledge or peculiar skill, by enjoining acts or conduct that would constitute a breach of such contract. . . . *While in such cases the singer, actor, or musician has been enjoined from appearing during the period named at a place and for parties different from those specified in his first engagement, it was never supposed that the court could by injunction compel the affirmative performance of the agreement to sing or to act or to play.*"

It is, as was remarked in *Gossard v. Crosby*, (Iowa) 109 N. W. 483, 6 L. R. A. (N. S.) 1115, 1129, "wholly not of harmony with the spirit of our institutions" that the court should coerce the rendition of personal services. Willoughby in his Constitutional Law of the United States (2nd Ed. 1929) Sec. 743, writes:

> "The Thirteenth Amendment renders unenforcible contracts for personal services, suits for damages in cases of breaches of such contracts being the only remedy left to the ones to whom such services have been promised."

In *Bailey v. Alabama*, 219 U. S. 219, 240-242, 55 L. Ed. 191, 201, the Supreme Court observed:

> "It is the compulsion of the service that the statute inhibits, for when that occurs, the condition of servitude is created, which would be not less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor."[6]

[6]See, also, *Shaw v. Fisher*, 13 So. Car. 287, 292 (1920); *Birmingham T. & S. Co. v. Atlanta etc. Ry. Co.* (D. C. Ga. 1921) 271 Fed. 743, 744; *Mary Clark's case* (Ind. 1821) 1 Blackf. 122.

A servitude is surely rendered no less involuntary because the services are "extraordinary" or "unique" or the *quid pro quo* is measured in terms of thousands instead of tens of dollars.

While only having selected an occasional case here and there to develop the thought, we believe it to be abundantly clear that these exceptions written into subdivision 5 of sections 3423 of the Civil Code and 526 of the Code of Civil Procedure did not and could not sanction the anomaly of a court of equity attempting affirmatively to compel the direct enforcement of unique and artistic services.

If, then, "The Million Dollar Exception" does no more than codify the doctrine of *Lumley v. Wagner,* as must necessarily, it seems, be its true interpretation, its application by the courts will be governed by the same limitations and restrictions that are inherent in the parent rule.

It has long been one of the principles of equity that a court of Chancery will not do by indirection that which it refuses to do directly.[7] Even the most obdurate will agree that equity will not specifically enforce a covenant to render personal services, nor, if our labored effort to establish a premise counts for aught, will it do the same thing in purely negative form. It will, however, as we have seen, restrain the breach of a negative covenant, an undertaking not to render those same services to another. But unless that same jurisprudence which has been so solicitous of the personal liberty of the promisor in the restraint of trade cases,[8] is willing to subvert itself to verbal subterfuge, there are definite limitations upon the extent to which equity will enforce even the negative covenants of personal service contracts.

MOTION PICTURE CONTRACTS

Consider as an example the typical motion picture contract: It will contain a covenant on the part of the artist not to lend his artistic talents to another nor to appear in any dramatic, theatrical, radio, or motion picture production or shows, nor to permit the making of any phonographic recordations of his voice during the term of the contract. In addition the contract will provide that its term may be extended (without compensation) for such length of time as the artist may be in default in refusing to perform. If an injunction may be had as broad in scope as the negative stipulations of the actor, it is apparent that he is precluded from thereafter pursuing his chosen profession in any form unless perforce he swallow his pride and work out his initial undertaking. But if certain obvious principles of equity jurisprudence are not to be overlooked, relief as broad as that indicated cannot logically be anticipated.

If the negative covenant has no value to the employer and is of no significance in the contract except as an indirect means of coercing the artist to perform, it is apparent that equity in granting its injunction will be doing solely and by indirection that which it has steadfastly refused to do directly. This indicated limitation has been aptly termed "the doctrine of independent separate significance," and holds briefly that equity will not lend its aid to enjoin a breach of a negative covenant having no value apart from its effect in compelling performance of the affirmative obligation.

The author of a note in 157 *Law Times,* 467, 468, observes that this "separate independent significance" of the negative covenant was present in *Lumley v. Wagner:*

> "The point to be borne in mind is that the negative contract in *Lumley v. Wagner* was not merely the negative side of the contract to perform. It was

[7]See *General Petroleum Co. v. Beanblossom, supra.*
[8]See 6 Cornell L. Q. at p. 264.

> a definite independent stipulation, and the confusion has arisen from stress being laid on its negative form instead of on its independent character. . . ."[9]

The Restatement of Contracts in comment "g" to Section 380 emphasizes the necessity for its presence:

> "In personal service cases, an injunction should practically never be used primarily as an indirect means of enforcing the affirmative promises; it should be restricted to cases where the breach of the negative promise will in itself cause irreparable harm."

Professor Williston in his master work on contracts, Vol. 5, Section 1450, p. 4051, thus characterizes this limitation of the *Lumley v. Wagner* doctrine:

> ". . . the courts have shown a disinclination to enfoce negative covenants in such a contract where the effect would be to compel the employee either to remain idle, deprived of his earning power, or to perform the positive covenants. *In general, it is not the mere taking of new employment but unfair competition which equity enjoins.*"

While in probably all the personal service cases where relief has been granted, the negative even where implied, had a separate significance, in only a comparatively few has the application of this limitation arisen directly. Thus in *Harrisburg Baseball Club v. Athletic Assn.,* 8 Pa. Co. 337, the baseball player was under contract to play for the complainant who sought to enjoin him from playing for codefendant, a rival club. The particular claim of damage made by B was that since A was a player of great skill and reputation, his absence and refusal to play for the B club lessened its drawing powers and consequently its receipts. There was no allegation that B would be injured by A's playing for C, except as such playing would involve his loss as a player to B. Therefore, an injunction restraining A from playing for C would not lessen the damage to B unless it would result in compelling A to play for B. In refusing the injunction upon this ground, the court said:

> *"But where the injury arises from his failure to perform service for the plaintiff, which is of such a nature that the court cannot compel specific performance, and where his rendering service to a third party is not the direct cause of the injury to the complainant, then the injunction should not be granted, because, if it be, the court is attempting to do indirectly what it cannot do directly."*

Similarly, in *DePol v. Sohlke,* 7 Robt. (N. Y.) 280 (30 N. Y. Super. 280) an injunction was refused restraining a danseuse from appearing in New York on the ground that the plaintiff had no theatre there and would not be injured by her performing for another, the court observing, p. 283:

> "In the present case the performance of the act in question (considered irrespective of any connection with the obligation to render services to the plaintiffs) can only produce damage by withdrawing custom from the establishment of plaintiffs. As then, the plaintiffs have not at present and are not likely to have for some time to come, an establishment in active operation, therefore no custom can, at present, be withdrawn from them, and it follows that no damages are now resulting, or can be anticipated to result, for some time to come, from the act which it is sought to enjoin."[10]

In the Bette Davis case (*Warner Bros. v. Nelson, supra*) the court made it abundantly clear that the negative will not be enforced simply for the purpose of compelling performance under the contract. In that case the court quoted largely from *Robinson & Co. v. Huer,* 79 L. T. Rep. 281, wherein the decree had been "framed so as to give what was felt to be a reasonable protection to plaintiffs, and no more" and stated:

> "As I read the judgment of the Court of Appeal in *William Robinson and*

[9] See, also, *Ryan v. Mutual Tontine Westminster Chambers Assoc.* (1893), 1 Ch. 116, 127.

[10] To the same effect see *Lee v. Chicago League Ball Club,* 169 Ill. App. 525.

> *Co. Limited v. Huer* (sup.), the court should make the period such as to give reasonable protection and no more to the plaintiffs against the ill effects to them of the defendant's breach of contract. The evidence as to that was perhaps necessarily somewhat vague. The main difficulty which the plaintiffs apprehend is that the defendant might appear in other films while the films already made by them and not yet shown are in the market for sale or hire, and thus depreciate their value. I think that, if the injunction is in force during the continuance of the contract or for three years from now, whichever period is the shorter, that will substantially meet the case."

The same thought is inherent in the language of the opinion in *Shubert v. Angeles* (App. Div.) 80 N. Y. S. 146, where defendant, whose special talent was as a mimic actress, appealed from an injunctive decree enjoining her from appearing for plaintiff's rivals in breach of her contract with Shubert. Commenting on the fact that the decree went no further than to prevent damage to her employer, the court said, p. 147:

> "Nor are the provisions obligatory on the defendant so harsh and inequitable that they will not be enforced by a court of equity. *The injunction, as granted does not prevent the defendant from performing as an actress, but only from making certain imitations or mimicking other actresses and actors.*"

In short, the true rationale underlying equity's aid in such cases is restraint against unfair competition during the term of the agreement, rather than any desire to accomplish indirectly that which the court may not do directly, and any relief broader in scope or longer in duration[11] than necessary to accomplish this end would seem to be unwarranted.

The question remains how to reconcile this conclusion with the code sections in question. These sections as they stood prior to the 1919 amendment: "An injunction cannot be granted . . . to prevent the breach of a contract the performance of which would not be specifically enforced" were an elaboration of the time-honored principle that a contract may not be specifically enforced in the absence of mutuality of remedy (C. C. Sec. 3386; 23 Cal. Jur., p. 445). They extended the doctrine to cases whereunder injunction against breach was sought by one who could not himself be compelled specifically to perform.[12] As the employer on his part could not be compelled to continue the employment, the remedy of injunction against his employee was denied him. The exception added in 1919 obviated the necessity for this mutuality of remedy under the circumstances specified and opened the doors of equity to the employer not for the purpose of restraining any and all breaches of his agreement by the artist, but rather to enable equity to lend such aid as might under the circumstances of the particular case and from past precedent be necessary to the fair protection of the employer, irrespective of a want of mutuality of remedy.

It is likely that our "Million Dollar Exception" so-called does not make injunctive relief against breaches even of his negative stipulations a matter of right against the actor; it would still seem incumbent upon the employer, under the statute as at common law, to show to the satisfaction of the court that injury not measurable by damages will result to him from the threatened breach and that that injury is separate and independent from the loss of the actor's services.

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[11]See Labor Code Sec. 2855 prescribing a maximum of seven years after commencement of service for enforcement of personal service contracts.

[12]*Poultry Producers etc. v. Barlow*, 189 Cal. 278, wherein plaintiff sought to compel defendant to sell and deliver eggs to it and also to restrain him from selling to others, the court said, p. 281: "Both of these remedies are subject to the same limitation. Neither can be enforced unless there is mutuality of remedy between the parties." And cited C. C. Sec. 423 (5) as extending the necessity for mutuality of remedy to injunctions against breach of contract.